DRN-4613980

The complaint

Mrs H is unhappy that Charles Stanley & Co Ltd ("CSL") made a mistake when advising she could take tax free cash ("TFC") withdrawals from her SIPP, by failing to identify they would be classed as unauthorised payments and expose her to HMRC tax penalties. She's also unhappy with the level of support she's received from them since the issue arose.

What happened

Following a divorce, Mrs H was awarded a share of her ex-husband's employer's pension policy ("the L scheme"). Her share was eventually valued at just over £824,000.

Mrs H engaged CSL to help advise with the transfer of these funds from the L scheme, who recommended they be invested in a SIPP. The funds were transferred in November 2016.

Shortly afterwards, Mrs H began exploring the financing options relating to the purchase of a new home, and particularly the extent to which (some of) these funds could be used to assist in that purchase. Mrs H was, by her own admission, financially "naïve", and agreed with CSL's assessment that she had a cautious approach to investment.

CSL told Mrs H she was entitled to take TFC from the pension, and in 2017 arranged for her to withdraw £20,000 (to assist with the purchase of a car) and in 2018 withdraw £189,431 (to contribute towards the purchase of her new home) from the SIPP.

In 2021, Mrs H was concerned at the performance of the SIPP. She believed the portfolio was underperforming, and annual charges were greater than fund growth in some years. She engaged a new financial advisor to review her pension arrangements. At this point, it was discovered that the two TFC withdrawals were 'unauthorised payments' – Mrs H wasn't entitled to make *any* TFC withdrawals from the pension – and that she may now be liable for HMRC penalty charges in relation to each of them. Unhappy with this, Mrs H complained to CSL. In summary, she said the following:

- CSL provided negligent financial advice, failing to identify Mrs H wasn't permitted to take TFC from the funds received under the pension sharing agreement after her divorce.
- CSL's advice had resulted in her being liable to significant, and in her opinion avoidable, HMRC penalty tax charges.
- Had CSL provided correct advice – that any withdrawals from her SIPP would be subject to tax – she wouldn't have proceeded with the withdrawals and would have instead chosen to explore cheaper property purchase options.
- Mrs H concluded by saying she expected CSL (and/or the Trustees of her ex-husband's pension) would cover any financial loss she subsequently experienced.
- Her SIPP underperformed, and CSL's fees were excessive.
- Mrs H was also unhappy at CSL's suggestions about how she could repay the penalty tax charges.

CSL provided a comprehensive response in January 2022, which I very briefly summarise:

- They accepted the advice they provided regarding the TFC (and her Lifetime Allowance) was incorrect, but this was caused by the L scheme administrators ("the administrators") given them incorrect information following the pension sharing Order. It was also affected by the changing pension transfer values they were provided with.
- But they regretted and apologised for inadvertently misleading Mrs H, having relied on the information received from the administrators.
- They believed they had proactively chased the L scheme Trustees ("the trustees") and administrators for information and provided a detailed timeline evidencing that.
- They confirmed their belief that the trustees, as her agent, should investigate their mistake and "*establish their culpability*"
- They believed Mrs H had benefitted from the incorrect advice, as in effect she'd been in receipt of a tax free 'loan' and was able to purchase a more expensive property (than she'd otherwise have been able to afford) that had increased in value by over 20% in the three years she'd owned it.
- They said Mrs H's SIPP returns were in line with her risk profile – she'd prioritised capital preservation and required a cautious investment portfolio. CSL were mindful Mrs B was an inexperienced investor, was recently divorced, and had been left with minimal assets. There had been an agreed approach that would minimise the risk of capital losses.
- In accordance with this approach, high cash balances were held (at Mrs H's request, and in anticipation of the property purchase), which would have further impacted on the SIPP's ability to achieve growth.
- CSL's fees since the inception of the SIPP were just over £53,000, compared to an investment return of just under £180,000 after those costs.
- CSL regularly updated Mrs H on the performance of her SIPP and had discussions with her about her risk profile - but Mrs H decided to remain 'cautious' in her investments.
- Notwithstanding, they offered Mrs H compensation of £5,000 in recognition of the distress and inconvenience she'd experienced.

There followed a considerable number of exchanges between CSL, the administrators and trustees, with CSL seeking agreement from the trustees regarding their mistake, and the extent to which they'd be prepared to cover the penalty charges Mrs H would be liable for.

Mrs H brought her complaint to this service in the meantime, along the same lines as above. Addressing Mrs H's concerns about her fund performance and management, one of our Investigators concluded that CSL had constructed an investment portfolio (within the SIPP) that met her attitude to risk and investment objectives at the time. Further, he noted Mrs H had asked the SIPP to hold close to £300,000 in cash, in anticipation of a property purchase, and as such investment returns would have been low.

On the issue of the unauthorised payments, he noted that CSL had initially told Mrs H the funds to be received from the L scheme would not qualify for TFC cash withdrawals because Mr H had already taken TFC when he initially took benefits from his pension (before the pension sharing order).

However, our Investigator also noted the scheme administrators provided contradictory information relating to this, which CSL challenged, but which was not corrected by them. He concluded CSL was entitled to rely on the information the administrators were providing – they were the professional entity who'd been managing the pension and were best placed to provide detailed information relating to it.

He also commented on the issue of the tax charges that would be levied, noting the trustees had now agreed to provide some compensation for this (up to £76,106, as of November

2022), subject to seeing evidence that HMRC had demanded such sum. That said, Mrs H's complaint was against CSL, not the trustees – and our Investigator had already concluded he felt CSL had acted reasonably in accepting what the administrators had told them (and advising Mrs H based on that). Our Investigator felt the administrators (and the L scheme and its trustees) were responsible for the fundamental mistake, but this wasn't something our Service could assist her with – as the Ombudsman Service doesn't have jurisdiction to consider complaints about the administration of an occupational pension scheme, which the L scheme was.

Mrs H was unhappy with this outcome. She believed our Investigator had missed the point of her complaint – in that it was *"in reality a holistic one around [CSL's] level of professionalism and the consequences of their mistakes…[and her]…complaint is not about the investment return".* She re-stated her concern that she was entitled to expect professional advice that followed HMRC guidelines, whereas the guidance she did receive failed to take account of the penalty charges she'd incur. She also remained unhappy with how CSL dealt with her after the (penalty charges) mistake had been made – she didn't think their suggestions about how to rectify the problem were fair. And Mrs H stated she would have explored alternative funding options when buying her property (family assistance, using her own job pension TFC, or taking a larger mortgage), or considered a smaller and cheaper property. She concluded by saying her SIPP had effectively been frozen for two years, meaning she's had to pay more management fees and received a lower return than she would have done elsewhere. And finally, that CSL have provided her with no support throughout this process. Mrs H asked that an Ombudsman review her complaint.

Subsequently, Mrs H paid the tax to HMRC that was due on the two withdrawals, using funds from her SIPP. And CSL continued their exchanges with the trustees, eventually resulting in their offer to repay scheme sanction charge assessments in relation to both withdrawals (calculated at 40% of the sums withdrawn), coupled with interest, totalling £91,501.12. The trustees also provided a letter of indemnity, valid for a further three years, indemnifying Mrs H (and the SIPP) against any further potential HMRC penalty charges. And in August 2023, after Mrs H had accepted their offer, the trustees paid Mrs H the above sum, provided the letter of indemnity, and paid her a further £2,500 to compensate her for the distress and inconvenience their mistakes had caused her.

Mrs H also confirmed to our Investigator that, notwithstanding the trustee having reimbursed her for the penalty charges she'd incurred (and may still incur), she still wanted her complaint against CSL to be considered by an Ombudsman.

The complaint was passed to me to consider, and I issued a Provisional Decision (PD) on this complaint on 19 January 2024. In that PD, I said as follows:

<u>My Provisional Decision:</u>

I want to begin here by highlighting we are an informal dispute resolution service, set up as a free alternative to the courts. In deciding this complaint I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to Mrs H. Rather it reflects the informal nature of our service, its remit and my role in it. That said, I want to assure both parties I've read all of the documents provided.

It's also important to recognise the position Mrs H now finds herself in. It's not in dispute the administrators provided incorrect information to CSL in 2016, and repeatedly so. And in acting on that information, CSL allowed withdrawals from the SIPP as tax free amounts – which they shouldn't have been – resulting in large HMRC penalties that Mrs H became liable for. The trustees have now accepted responsibility for their administrator's mistakes in

2016, and their financial effect on Mrs H. They've paid her an amount equivalent to all of the known penalties she's incurred and provided an indemnity in respect of any further HMRC penalty charges.

Furthermore, she has repaid the tax to HMRC that should have been charged on the two cash withdrawals. As such, Mrs H has been returned to the financial position she would have been in had the administrators provided the correct information, and her withdrawals were made as crystallising events with tax paid on them.

This is important because, in any complaint brought to this service where a consumer has suffered a financial loss because of the actions of the business complained about, we'd expect that consumer to be returned to the position they would have been in had those actions/mistakes not occurred.

I appreciate Mrs H has said she wouldn't have bought her current property had she known the amounts she took out of the SIPP to assist with the deposit weren't tax free. I've no reason to doubt those comments. However, whilst the value of Mrs H's SIPP may now be lower than it would have been (had the withdrawals not taken place, or been at a lower amount), that 'loss' is broadly balanced by her owning an asset that has a larger value (and over time will likely increase) than would otherwise have been the case. It's difficult, if not impossible, to work out how much worse/better off Mrs H is now, compared to what her financial position would likely have been had the mistaken advice not been given – and that's before deciding whether (if at all) CSL are at fault for any potential change in that position. Accordingly, I won't be addressing this element of Mrs H's comments any further, as I'm satisfied Mrs H is at the very least likely to be no worse off that she would otherwise have been had the mistaken advice not been provided. This means that I'll only now be considering the extent to which CSL caused any distress and inconvenience that was experienced by Mrs H.

I should also make clear here I'm making no comment on the culpability of the L scheme, its administrators, or trustees, or on the redress they've offered and paid. Mrs H's complaint is about CSL's actions, and it's their actions only I must consider in deciding this complaint.

<u>CSL's actions leading up to when the TFC withdrawals were made</u>

That said, I recognise the trustees have accepted their administrators provided incorrect information. I also acknowledge CSL, at the outset, believed the pension transfer wouldn't allow for any TFC withdrawals. But, echoing a point made by our Investigator, I think CSL were entitled to rely on the clear and repeated subsequent statements made in 2016 by the administrators regarding whether the pension credit was a 'qualifying' one – allowing Mrs H to draw TFC from the sum transferred. That information/confirmation was repeatedly provided by the administrators, who would have been best placed to provide that information. That being the case, I can't reasonably conclude CSL did anything wrong in 2016 in accepting the administrator's confirmation that the pension credit Mrs H received was a 'qualifying' one, and that 25% of the sum was capable of being accessed via TFC.

I think the same rationale fairly applies to the times when Mrs H withdrew the two cash amounts in 2017 and 2018. These transactions were undertaken at a time when, I think, CSL were still reasonably relying on the clear instruction they'd received from the administrators (a point the trustees have essentially accepted).

That said, I do acknowledge Mrs H's point when she questions the inconsistency of CSL's actions when a Lifetime Allowance (LTA) 'enhancement factor' was applied for at the time of the second cash withdrawal – mistakenly, as applying for an enhancement could only be

applied to a pension that was already in payment to the original member at the time of the pension sharing order. Which of course this pension was, albeit it appears this remained unknown to CSL at the time. However, Mrs H hasn't experienced any negative financial consequence as a result of this mistake, so I don't need to consider this further.

CSL's actions after it became clear they'd provided incorrect advice

Mrs H believes CSL failed to properly, and proactively, assist her in her attempts to rectify the mistake and manage the subsequent effect of the mistaken advice they'd provided.

So, I've looked at every communication (that I'm aware of) that has taken place involving Mrs H, CSL and the trustees, from when her new IFA identified a potential issue surrounding the pension transfer, from May 2021 onwards. All parties are aware of these exchanges, and so I won't refer to them all in detail here. But having considered these in detail, both in terms of their quantity and content, I disagree with Mrs H, in part at least. I'll explain.

Shortly after being alerted to the issue in May 2021, CSL made multiple contact with the new scheme administrators, seeking to confirm the position. I think they robustly chased for a response in May and June 2021, insisting on escalation to the trustees when they didn't receive appropriate answers. This included raising a complaint with the administrators in August 2021, which did generate a response – confirming the information the previous administrators provided in 2016 was incorrect. CSL considered this, and quickly approached the trustees regarding the calculation and suggested payment of redress to Mrs H for the penalties she had/would likely incur. That said, I don't think CSL kept Mrs H as well appraised of their actions as they could have done during these exchanges, prompting her (in part) to raise a detailed complaint with CSL.

From the exchanges I've seen, there then appeared to be a lull in communications, prompting Mrs H to seek an update from CSL in February 2022. This appears to have prompted further communications between the parties, particularly between CSL and the trustees addressing tax implications, and CSL setting out in detail how much they felt the trustees should pay Mrs H. These exchanges took time, as CSL sought to address some push-back from the trustees, as well as awaiting HMRC confirmation of the penalties to be levied. And it wasn't until November 2022 that CSL were able to advise Mrs H on the trustee's amended offer of settlement.

That said, CSL had agreed in March 2022 to provide Mrs H with weekly updates, and whilst some clearly were provided, these were not on a weekly basis and often were sent only after Mrs H had chased for an update.

There appears to have been a further lull in communications, based on what I've seen, and it wasn't until about July 2023 that CSL again approached the trustees, having been able to provide greater clarity on the potential HMRC penalty amounts. It was at this point that they questioned whether the trustees would be willing to consider a D&I payment to Mrs H for the distress their actions (or the administrator's actions) had caused. Further CSL/trustee exchanges took place, culminating in the trustee's final (and accepted) offer, as detailed above, in August 2023. Payment was made to Mrs H in September 2023.

So, whilst CSL clearly undertook considerable work seeking to rectify the effect of the initial mistakes, there were times when I think Mrs H was left without updates or information, and this despite a clear undertaking on CSL's part to provide weekly updates. I acknowledge that some of the delays in reaching a 'conclusion' here were out of CSL's control. They were dependent on the speed with which the trustees would respond to their requests. And there

was a need to wait for HMRC to issue final determinations, without which the trustees were unwilling to commit to a formal resolution.

However, leaving aside the fact the root cause of the problems stemmed from the administrator's actions, Mrs H was still CSL's client. CSL continued to manage her portfolio, charging her a full management fee (admittedly not designed to cover the type of extra work that CSL were engaging in). I think Mrs H was reasonably entitled to expect a greater degree of engagement (by CSL, with her) during this period. I think CSL should have done more to keep her fully appraised of the steps they were taking in dealing with the trustees (and SIPP provider), without the need for her to repeatedly seek updates.

I also want to address Mrs H's concerns regarding what she believes were unhelpful and worrying suggestions about what she'd need to do to either repay the withdrawn funds to her SIPP or pay the necessary HMRC penalties. I do understand what was being suggested – which included using her employer pension TFC (when taken), together with entering into a repayment plan to repay the funds, with mention also made about the sale of her property – would have caused significant unease. But, given Mrs H was faced with a situation (and at the very least a need to pay HMRC significant penalties) requiring significant financial action, I can't fairly say CSL did anything wrong by raising and/or discussing all potential solutions here, however uncomfortable they may have at first seemed.

<u>Distress and Inconvenience caused by CSL</u>

CSL initially made an offer of £5,000, to compensate Mrs H for the distress experienced. However, this was made before CSL had helped secure the trustee's settlement offer - which also included £2,500 D&I for the distress the scheme administrator's actions had caused Mrs H. Mrs H didn't accept that offer at the time. And CSL have since confirmed that offer of £5,000 D&I compensation is no longer available.

They've explained the initial offer was a "gesture of goodwill" payment in "recognition of the inconvenience and distress Mrs H experienced as a result of the incorrect information, provided to CSL, by the Scheme Trustees". CSL went on to explain their actions helped rectify a mistake not of their making and at a significant cost to them for which they received no payment. They also reference the £2,500 D&I compensation paid to Mrs H by the Trustees, concluding together this means it wouldn't be "appropriate" for CSL to compensate Mrs H any further for any distress or inconvenience she has suffered in the circumstances.

First of all, I want to repeat that in this complaint I am only considering the actions of CSL. I appreciate the trustees have paid Mrs H compensation, presumably on the basis that they realise/acknowledge their actions caused her significant distress. That payment was a matter for them and recognised the effect of their actions only. Here, I need to consider if CSL's actions caused Mrs H distress, and if I think they have, award an amount of D&I that I feel is appropriate in those circumstances – and I make clear here that D&I compensation paid by a different business, in relation to that business' mistakes, should and will not be used to reduce any amount of D&I that I choose to award here in relation to CSL's actions.

So, did CSL cause Mrs H any distress? I think they did. In saying that, I'm disregarding the immediate effects of her having been given incorrect advice by CSL. Distress was clearly caused as a result of that wrong advice, but the root cause of that lied with the actions of the administrator. And I also acknowledge CSL's point they expended considerable (unpaid) time engaging with the trustees and Mrs H, seeking to progress a solution for her. But I disagree that their actions in this regard effectively allow them to extinguish any obligation to pay compensation for any distress they may have caused Mrs H.

I've already said I think CSL's communications with Mrs H weren't sufficiently regular or as specifically promised. And I think it's clear that caused Mrs H considerable distress – compounded by the uncertainty of what she'd need to do to financially rectify the situation. CSL were clearly aware of her concerns and distress in this regard, and I think could have done more to help reduce and/or manage those concerns. So, I think CSL must pay some D&I compensation to Mrs H in recognition of this.

However, the amounts this Service awards for D&I are fairly modest in value. Our D&I awards are not designed to punish a business, but rather to put a monetary value on the distress a business' actions have caused. Guidelines setting out our approach to such awards can be found on our website. I think a D&I award of £650 is appropriate here.

Summary

I'm satisfied Mrs H has already been placed back into the financial position she would have been in, had the mistaken advice not occurred. Accordingly, I only need consider the distress and inconvenience caused to Mrs H by CSL's actions – and not those caused by any other party. On that basis, I think CSL did cause unnecessary and avoidable distress to Mrs H, and I think they should pay her D&I compensation of £650 in recognition of this.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Both parties have responded, accepting my PD recommendation, and suggested D&I award that CSL must pay to Mrs H. So, in the absence of any other comments for me to consider, that's what I'll be requiring them to do.

My final decision

I uphold Mrs H's complaint against Charles Stanley & Co Ltd, and require them to pay her £650 compensation for distress and inconvenience caused. This must be paid to her within 28 days of being notified of her acceptance of this Decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 8 March 2024.

Mark Evans
Ombudsman